UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

RANDALL K. HASKELL,	)	
	)	
Petitioner	)	
	)	
v.	)	Civil No. 03-001-B-S
	)	
STATE OF MAINE	)	
	)	
	)	
Respondent	)	

RECOMMENDED DECISION ON 28 U.S.C. § 2254 PETITION

Pursuant to 28 U.S.C. § 2254, Randall Haskell has filed a petition for habeas corpus review of his State of Maine conviction for his sexual abuse of a minor. (Docket No. 1.) Haskell, who plead guilty, asserts that the failure to charge his "sex offender" status in the indictment violated the principles of Apprendi v. New York, 530 U.S. 466 (2002). His theory is that the Maine law requirement that he register as a "sex offender" as a consequence of his conviction increases the criminal penalty beyond the statutory maximum for his sexual abuse of a minor conviction. The State has filed a response. (Docket No. 3.) I now recommend that the Court **DENY** Haskell 28 U.S.C. § 2254 relief.

Discussion

The State acknowledges that Haskell's petition is timely, see 28 U.S.C. § 2244(d)(1), and that he has exhausted his state remedies, see id. §§ 2254(b),(c). However, as there is no decision by a state court to review under the deferential standards of the Anti-Terrorism and Effective Death Penalty Act's (AEDPA) 28 U.S.C.

§ 2254(d),[1] I address the legal parameters of the claim under the less deferential de novo standard, per the First Circuit's Fortini v. Murphy, 257 F.3d 39 (1st Cir. 2001). Id. at 47. ("After all, AEDPA imposes a requirement of deference to state court decisions, but we can hardly defer to the state court on an issue that the state court did not address.") Accordingly, I must determine whether Haskell's conviction and/or sentence run afoul of the Constitution. See Niziolek v. Ashe, 694 F.2d 282, 287 (1st Cir. 1982) (pre AEDPA case observing the 28 U.S.C. § 2243 "statutory mandate that such petitions be resolved 'as law and justice require,'" and noting that under 28 U.S.C. § 2254(a), "a state prisoner is entitled to federal habeas relief only when his or her custody is in violation of the Constitution, laws or treaties of the United States").

I conclude that there is no constitutional infirmity in Haskell's conviction or sentence. This is because, in my view, the Apprendi rule is not implicated by the Maine's sex offender registration requirement.

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[1] Much to his credit, the State Solicitor is not asserting that Haskell's Apprendi claim was waived or procedurally defaulted because he is troubled by the summary dismissal of Haskell's state post conviction petition as being time-barred. The denial of a claim by a state post conviction court for procedural reasons can bar federal review of the merits of a claim when the denial is based on an "independent and adequate state law ground." Coleman v. Thompson, 501 U.S. 722, 729 (1991) (observing that federal courts "will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment."); e.g., Sones v. Hargett, 61 F.3d 410, 416-18 (5th Cir. 1995) (concluding that Mississippi's statute of limitation ground for denying claim was an independent and adequate state law ground). However, in this case Haskell had filed a prior 28 U.S.C. § 2254 petition that was dismissed by this Court with the approval of the State because it appeared that Haskell's claim was unexhausted and that he still had time to properly exhaust his claim in the state courts. When Haskell attempted to exhaust his claim by filing a state post conviction petition, it was dismissed by the court as untimely. The State Solicitor candidly explains that he thought the state court would consider Haskell's attempted sentence appeal as part of the direct appeal process under applicable state statutes and therefore that time would not be properly counted toward the one-year state statute of limitation. (Answer at 8 ns.12 &14, 13-15 & n.28.) The State Solicitor's approach has spared this court from undertaking the sometimes thorny analysis of whether the state court procedural decision was truly based upon an independent and adequate state law ground. For a state procedural rule to constitute an adequate and independent state ground barring federal habeas review, that rule must be consistently enforced in the state courts. See McCambridge v. Hall, 303 F.3d 24, 49-52 (1st Cir. 2002) (Lipez, J., dissenting).

Haskell was convicted of sexual abuse of a minor under 17-A M.R.S.A. § 254. The Maine registration scheme as applicable to Haskell runs as follows. "Sex offense":

> means a conviction for one of the following offenses or for an attempt or solicitation of one of the following offenses if the victim was less than 18 years of age at the time of the criminal conduct:
> ...
> **B.** A violation under Title 17-A... section 254 ....

34-A M.R.S.A. § 11203(5) (West Supp. 2001). In a provision entitled "Duty of sex offender or sexually violent predator to register," the title 34-A provides:

> **Determination by court.** The court shall determine at the time of conviction if a defendant is a sex offender or a sexually violent predator. A person who the court determines is a sex offender or a sexually violent predator shall register according to this subchapter.

34-A M.R.S.A. § 11222(1). In turn, title 17-A provides that as part of a sentence for offenses defined in 34-A M.R.S.A. § 11203 "the court shall order every natural person who is a convicted sex offender or sexually violent predator.... to satisfy all requirements set forth in the Sex Offender Registration and Notification Act of 1999." 17-A M.R.S.A. § 1152. See also 17-A M.R.S.A. § 1204 ("The court shall attach as a condition of probation that the convicted sex offender, as defined under Title 34-A, section 11203, subsection 5 ... satisfy all responsibilities set forth in Title 34-A, chapter 15, the Sex Offender Registration and Notification Act of 1999.").

At the time he entered his plea and was sentenced the presiding justice determined that Haskell had plead guilty to an offense that qualified as a 34-A M.R.S.A. § 11203(B) offense and ordered him to register per the directive of 17-A M.R.S.A. § 1152(2-C). Haskell's agreement to register was a precondition to the acceptance of plea although, in so agreeing, Haskell, through his attorney, indicated that he might challenge the constitutionality of the registration requirement. Haskell's registration was made a

special condition of probation per 17-A M.R.S.A. § 1204(1-C). Haskell brings this 28 U.S.C. § 2254 petition because he views the sex offender registration scheme to which he was subjected as generating Apprendi concerns.

In a nutshell, the Apprendi Court considered the question of "whether the Due Process Clause of the Fourteenth Amendment requires that a factual determination authorizing an increase in the maximum prison sentence for an offense from 10 to 20 years be made by a jury on the basis of proof beyond a reasonable doubt." 530 U.S. at 469. The Court held: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Id. at 490.

Haskell plead guilty to gross sexual conduct under 17-A M.R.S.A. § 254. A violation of this criminal provision is expressly listed as a "sex offense" under 34-A M.R.S.A. § 11203(5), triggering the registration requirement of 17-A M.R.S.A. § 1152(2-C). Thus, there is no "fact" outside those necessary to obtain conviction that increases the penalty for a crime beyond the prescribed statutory maximum. Or, in other words, even if the registration were a "penalty" within the meaning of Apprendi, it is a penalty that is part and parcel of the prescribed statutory maximum for the gross sexual assault offense under Maine law. While it is the Court that makes the determination at the time of conviction whether the defendant stands convicted of a crime requiring registration, see 34-A M.R.S.A. § 11222(1), the "fact" that governs this determination is whether or not the offense of conviction is one listed in § 11203(6). This is a purely legal, if not mechanical, determination, and there is no additional finding of fact that the Court makes

necessary to trigger the registration requirement and, therefore, there is nothing that could implicate the rule of Apprendi.

I draw further support for this conclusion from sex offender registration cases decided this term by the Supreme Court. In Smith v. Doe, the United States Supreme Court held that Alaska's sex offender registration requirement and notification law was not punishment within the meaning of the ex post facto jurisprudence. __ U.S. __, 123 S. Ct. 1140, 1154 (2003).[2] Undertaking a thoroughgoing two-prong -- intent and purpose/effect -- analysis, id. at 1147-54, the Court viewed the Alaskan law as a civil scheme calculated to protect the public from harm, id. at 1147, one intended as "a civil, nonpunitive regime," id. at 1149. With respect to the scheme's effects, the Court, among other things, acknowledged the stigma attaching to the registration and notification but observed that the stigma arose, "not from public display for ridicule or shaming," but from the "dissemination of truthful information" that furthered a nonpunitive governmental objective. Id. at 1150. "Widespread public access is necessary for the efficacy of the scheme" the Court reasoned, "and the attendant humiliation is but a collateral consequence." Id. Along the way to its determination, the Court expressly rejected the Ninth Circuit Court of Appeals conclusion that the restraint of the registration system is parallel to that associated with a term of probation or supervised release that implicate Ex Post Facto clause concerns. Id. at 1152.

This term the Court also overturned the Second Circuit Court of Appeals in Connecticut Department of Public Safety v. Doe, __ U.S. __, 123 S. Ct. 1160 (2003).

[2] In briefs to the Court, both the petitioners and amicus curiae in support of the petitioners cited to Apprendi for the proposition that the loss of liberty and stigma associated with criminal punishment are the hallmarks of criminal punishment and that the registration requirement labels the offender as someone to be shunned as undesirable.

The Second Circuit had held that Connecticut's public disclosure of its sex offender registry violated the Due Process Clause because the public disclosure of the sex offender status implicated a liberty interest and the State did not provide the registrants with a pre-deprivation hearing to determine whether they were likely to be a danger to the community. Doe v. Dept. Pub. Safety, 271 F.3d 38 (2d Cir. 2001). The Supreme Court observed that "the law's requirements turn on an offender's conviction alone – a fact that a convicted offender has already had a procedurally safeguarded opportunity to contest," and the question of whether or not the offender was entitled to a hearing on whether he or she posed a danger going forth is "a bootless exercise." 123 S. Ct. at 1164.

Given the rejection of the ex post facto and procedural due process challenges to state sex offender registration and notification schemes, it would be incongruent for the Court to turnaround and declare that, Smith and Connecticut Department of Public Safety aside, the registration requirement raised Apprendi concerns as a punishment and that the "status" must be proven by proof beyond a reasonable doubt. Though I give them short shrift here, the reasoning of both cases supports my conclusion vis-à-vis Haskell's Apprendi argument that the "facts" triggering the sexual offender registration requirement are the facts underpinning the sexual offense conviction itself, and nothing more.

Conclusion

Because I conclude, for the reasons above, that there is no merit to Haskell's 28 U.S.C. § 2254 claim, I recommend that the court **DENY** the petition.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

April 15, 2003

_____
Margaret J. Kravchuk
U.S. Magistrate Judge

ADMIN

U.S. District Court
District of Maine (Bangor)
CIVIL DOCKET FOR CASE #: 1:03-cv-00001-GZS
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HASKELL v. MAINE, STATE OF
Assigned to: Judge GEORGE Z. SINGAL
Referred to: MAG. JUDGE MARGARET J. KRAVCHUK
Demand: $0
Lead Docket: None
Related Cases: None
Case in other court: None
Cause: 28:2254 Petition for Writ of Habeas Corpus

Date Filed: 01/03/03
Jury Demand: None
Nature of Suit: 530 Habeas Corpus (General)
Jurisdiction: Federal Question

(State)

Plaintiff

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V.

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